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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1047~~ 83

MERION CRICKET CLUB,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN LEWIS EVANS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Merion Cricket Club, respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review a judgment of that Court in the above entitled cause, entered on March 28, 1941.

Opinions Below.

The opinion of the District Court (R. 64a) is not reported in the official reports. The three opinions in the Circuit Court of Appeals (R. 69a) are not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 28, 1941 (R. 76). The jurisdiction of this Court is evoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. A. § 347.

Question Presented.

If the members of a club have the option of playing golf by the payment of an annual fee and the privilege can be terminated at the end of the year, are the golf fees subject to the 10% tax imposed by the Revenue Act of 1928 on dues or membership fees?

Statutes and Regulations Involved.

Sec. 413 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 864, (see 26 U. S. C. A. 1940 Ed., § 1710) imposes:

> "a tax equivalent to 10 per centum of any amount paid * * * as dues or membership fees to any social, athletic or sporting club."

The section is quoted in full in Appendix A (p. 6).

The pertinent Regulations are given in Appendix A (p. 7).

Statement of the Case.

This is an action by the Merion Cricket Club against the United States to recover $18,690.29 which the club collected from its members and paid to the collector, as the 10 per cent. Federal dues tax, on golf fees for the years 1931 to 1935.

The case was tried before Judge Kalodner and resulted in a judgment for the defendant. Judge Kalodner's opinion (64a) adopted without discussion that of Judge Kirk-

patrick in *Hardt* v. *McLaughlin*, 25 F. Supp. 684, a suit brought by a member of the Merion Cricket Club involving the same questions of law and fact, but from which no appeal was taken. The Hardt opinion appears in the Record (57a).

By agreement of the parties approved by the trial judge in this case, no evidence of damages was given with the understanding that if judgment was entered for plaintiff in the District Court, or on appeal, the plaintiff would be given an opportunity to prove the damages.

The by-laws provided for ten classes of membership with the qualifications, the privileges and the dues of each class (14a and 22a).

The by-laws provide (17a) that Playing Members (who have all the privileges of the club except the right to use the two club houses) may transfer to the Senior or the Family class, and that Senior Members (who have the same rights as Playing Members plus the use of the two club houses) may transfer to the Family Class (who have in addition the right to cards for the ladies of their household). But neither family nor Senior Members are permitted to move down to a lower class with lower dues.

Members of all the classes, except Playing Members (none of whom were allowed to play golf) (50a), were given the privilege of playing golf for an annual fee, payable in semi-annual instalments. The fees varied from $30. for members under 21, to $110. for male members over 21, and they did not depend on the class of membership to which the member belonged (20a and 22a).

The club had two club houses, one known as the main club house and the other as the golf house. All members who could use the main club could also use the golf house without regard to whether or not they had paid the fee for the privilege of using the golf course (17a).

The golf privilege could be terminated by notice before the end of the year, and if such notice was not given the member was liable for another year's fee (20a).

The club made fixed charges for the use of various other similar privileges and facilities for substantial periods of time, and the government has never demanded the dues tax on such fees (45a and 46a).

There was no confusion in the by-laws between the dues and the golf fees, or between the privileges which the members of the various classes of membership obtained by the payment of the dues and the golf privileges obtained by the payment of the golf fees.

The plan of membership set-up has been the same since 1892, and the method of charging for golf has been the same since 1896—21 years before the Federal dues tax was first imposed in 1917 (40a, 43a).

The Circuit Court of Appeals affirmed the judgment on March 28, 1941. Judge Clark wrote the opinion of the Court, Judge Jones wrote a concurring and Judge Maris a dissenting opinion.

Reasons Relied On for the Allowance of the Writ.

1. The decision rendered is in conflict with the decision of the Circuit Court of Appeals for the 1st Circuit in the case of *White* v. *Winchester Country Club*, 117 F. (2d) 146, and with that of the Circuit Court of Appeals for the 9th Circuit in the case of *Foran* v. *McLaughlin*, 59 F. (2d) 158, cert. denied, 287 U. S. 637, these cases being on the same matter as that involved in this case.

The decision is also in conflict with two District Court decisions in the 4th Circuit, decided in favor of the taxpayer and not appealed by the United States:

Baltimore Country Club v. *United States*, 7 F. Supp. 607 (D. C., Md. 1934).

Williamson v. *United States*, 12 F. Supp. 26 (D. C. W. D. N. C., 1934).

These cases are discussed in the supporting brief.

2. This case decides an important question of Federal law which has not been, but should be, settled by this Court.

The court's attention is called to the fact that the United States has filed a petition for a certiorari in *White* v. *Winchester Country Club*, *supra*, assigning the same reasons for the granting of the writ as are assigned in this petition, and that the Solicitor General states (p. 7 of that petition) that if that petition is granted, the Government will not oppose a petition in this case.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari be granted.

JOHN LEWIS EVANS,
Attorney for Petitioner.

May 10, 1941.

APPENDIX A.

The Revenue Act of 1928.

Section 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. at Large 864 (see 26 U. S. C. A. (1940) § 1710, Internal Revenue Code § 1710, 53 Stat. Part 1, p. 192), is as follows:

"Club dues tax.—(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to member-

ship, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

TREASURY REGULATIONS 43 (1928 REV.):

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, that the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year,

dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable.

Examples— • • •

(5) A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

• • • • • • •

(8) A tennis club in which the annual dues are $25 levies an assessment of $2 per year on each member to cover cost of tennis balls. The dues, fees, and such assessments paid by members of this club are taxable.

• • • • • • •

The fourth paragraph is derived from Article 9 of Regulations 43 Revised May 16, 1926, which was approved shortly after the decision of *Weld* v. *Nichols* (cited *infra* in our Brief). This 1926 Revision deleted from the Revision of September 1924 certain portions inconsistent with the *Weld* decision. In the following quotation from the 1924 Revision we have italicized the portions deleted by the Revision of 1926:

Art. 9. Dues or membership fees.

• • • • • • •

Where the dues or membership fees, determined in the manner herein outlined, of an active resident annual member are in excess of $10 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $10 per year, are subject to the tax. *So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links.* A "greens fee" charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the Act, and therefore not taxable.

* * * * * * *

Example 7. The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee.

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BRIEF SUPPORTING PETITION FOR CERTIORARI.

The petition contains a statement that the opinions below do not yet appear in the official reports, a statement of the grounds on which the jurisdiction of this Court is invoked and a statement of the case.

ARGUMENT.

Section 413 of the Revenue Act of 1928 (Appendix A of the petition, p. 6), imposes "a tax equivalent to 10 per centum of any amount paid * * * as dues or membership fees to any social, athletic or sporting club." The only question in the case is whether, if the members of a club have the option of playing golf by the payment of an annual fee and the privilege can be terminated at the end of the year, the golf fees are subject to this tax.

Summary of Argument.

We will show that the decision in the case at bar is in conflict with the decision in the *Winchester* case; that the theory and reasoning of the two majority opinions in the case at bar have no common basis; that each of the opinions is contrary to the principle laid down by the *Foran* case and by the two unappealed District Court cases in the Fourth Circuit; and that the meaning of the statute is now in such a confused and uncertain condition as to make an authoritative construction by this Court most necessary.

1. Analysis of the Three Opinions Below.

Judge Clark in delivering the opinion of the court (R. 69) starts his discussion with the meaning of dues or membership fees by stating that the word "club" is derived from the Anglo-Saxon "cleofan", meaning "to divide the reckoning" and that the theory of a club is one of joint expenditure. Some clubs divide the entire expenses among the whole membership. But most clubs except the cost of certain supplies and services and apportion the charge for them to the particular recipients. What remains comes from the members generally in the name and form of "initiation fees" and "dues". The charges which the club makes for those supplies, services, or facilities which *can* be apportioned and allotted to the particular recipients of them, are *not* dues. But when the cost of certain supplies, services and facilities cannot be so apportioned and allotted, the cost must be charged to the members generally and the charges are dues.

All the other twelve judges who have written opinions on the subject have based their discussions on the kind of *member obligation* included in the word "dues". Judge Clark disapproves the five cases most frequently cited and

their reasoning as "judicial hair-splitting" and "confusing refinements", and states that they lack logic.

Judge Jones in the concurring opinion (R. 73) states that these golf fees are dues or membership fees because

> "The payments were made in discharge of a yearly obligation (payable semi-annually) which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privileges for the ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all."

The dissenting opinion of Judge Maris (R. 74) defines dues or membership fees by stating that they

> "must be based upon membership in the club and must be payable by all the members of a particular class of membership, not merely by those of the class who elect to make use of a special club facility" and
>
> "they must represent a recurring, contractual obligation extending over an indefinite period of time."

The opinion points out that this definition is in accord with the two other Circuit Court of Appeals cases (*White* v. *Winchester Country Club* and *Foran* v. *McLaughlin*, which are discussed in detail later in this brief), and with the views of all the courts which have considered the subject except the District Court in the present and in a prior related case (*Hardt* v. *McLaughlin*, *infra*).

2. Analysis of the Conflicting Cases.

White v. *Winchester Country Club*, 117 F. (2d) 146 (C. C. A. 1st Circuit, 1941).

This case also involved the question whether annual golf fees were "dues or membership" fees under the Revenue Act of 1928. The by-laws provided for two classes of membership and that a member could play golf by the payment

of $50 a year for "Full Privileges" or $35 for "Limited Privileges"—the latter not permitting the member to play at certain times during the spring and fall months.

The opinion quotes the definition given by Judge Maris, which originated in the first and leading case of *Weld* v. *Nichols*, 9 F. (2d) 977 (D. C. D. of Mass., 1925), as follows:

> " 'definite obligations incidental to membership in the club', covering 'only fixed and definite charges applicable to all members of each particular class of membership.' "

The opinion (p. 148) cites *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (D. C., E. D. of Pa., 1936), which also involved the golf fees of the Merion Cricket Club and the facts of which were identical with those of the case at bar as it was tried on the record in the *Hardt* case. The opinion in the instant case comments on the *Hardt* case as follows:

> "In the Hardt case it appeared that the liability for golf fees was fixed in the same way as ordinary club dues, a 'recurring contractual obligation.' "

These conclusions, drawn from the *Hardt* opinion could hardly have been made if the evidence had been before the court.

1. The evidence in the *Hardt* case (44a) shows that the commencement and the termination of the liability to pay the Merion golf fee were each fixed by a simple notification to the club, without approval by the board, committee, or any official of the club,—just as in the *Winchester* case.

2. The Merion golf fee is "recurring" only in the sense that it "recurred so long as the member chose to enjoy [it]" as Judge Jones states in his concurring opinion. Precisely the same condition existed with the Winchester golf fee, as the club billed the member for the fee for the next year if the member failed to indicate whether he desired the privilege for another year.

There is one difference between the facts of the instant case and of the case at bar. Under the Winchester by-laws, the golf privilege was for one year, but it was the practice to adjust the annual fee if the member desired to terminate the privilege during the year. At Merion the fee could be adjusted during the year only when there was a member waiting and ready to take the privilege and pay the fee for the rest of the year. This condition existed for at least the first year of the period covered by the action for a refund. This distinction between the *Winchester* case and the case at bar turns on the strictness or formality with which the clubs were administered as stated by the Government in its petition for a certiorari in the *Winchester* case.

It is submitted that the *Winchester* case is directly in conflict with the case at bar.

Foran v. *McLaughlin*, 59 F. (2d) 158, cert. denied 287 U. S. 637 (C. C. A. 9th, 1932).

This case dealt with the monthly fees paid by a member of the Olympic Club of San Francisco who held a "Contributing A Member" privilege to play golf. These privileges were not governed by the by-laws and the evidence consisted of circulars to members, resolutions of the board and the golf committee and oral testimony by the president of the club. It appeared that in order to finance the construction of a new golf course, the board issued a circular stating "it is planned to create a class to be known as 'Contributing Members.'" A payment of $275, afterwards increased to $1,000, entitled the member to a class A or a class B privilege at his option. The class A privilege required the member to pay a monthly fee of $4, the fee involved in the case. A class B privilege entitled the member to play by paying a daily green fee.

These members were elected by the Board after action by the Golf Committee, the usual form of which was that the Committee "recommends that the following be elected to

membership in the Olympic Club Class A * * *" or "recommends that the following be elected to Class A Contributing Membership in the Olympic Club. * * *" There were pages of testimony of resolutions referring to "Class A Contributing Membership" in the club. There were a number of cases where the club refused to approve a termination of the liability to pay $4 per month and others where this was permitted on conditions.

The opinion does not rest its decision that the fees were club dues on the finding of fact by the District Court that "said 'Class A Privilege' has in fact a class of membership in said Olympic Club." After stating that counsel agreed that "dues" and "membership fees" were "synonymous and convertible", and discussing the contradictory character of the evidence as to whether a new Class of Membership had been established and stating that "The actual, true nature and character of a right, or of a thing, is determined by its essential characteristics and not by the name by which it is called", the opinion proceeds to distinguish *Weld* v. *Nichols* (*supra*) as follows (p. 160):

> "That case involved an 'additional fee' of $7.50 for the privilege of playing golf for six months, on which fee a tax of 75 cents was assessed. The report of the case does not disclose whether the club member holding the golf privilege was or was not compelled to pay the 'additional fee' for another six months at the close of the first six-month period. It is not shown whether the member would have been absolved from paying the six-month fee in case he had decided he did not desire to play golf during the ensuing semester. In other words, the printed record of the Weld case, supra, is silent as to whether or not the member's obligation to pay the fee was a fixed and *recurring* one, and one that carried with it contractual liability. As will be seen presently, the appellant's obligation was of this latter kind." (The italics are by the writer of the opinion.)

The opinion then shows, by specific instances from the minutes, that the liability to pay $4 per month was not terminable at the option of the member and concludes (p. 161):

> "The foregoing excerpts from the minutes clearly indicate that, by whatever name these Class 'A' memberships were called, they entailed upon their holders a fixed contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens. Assuredly, then, these so called 'fees' were not for a single, casual, and occasional privilege—like a chance meal at the country club dining room—but represented a *recurring contractual* obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.' We therefore believe that these 'fees' were properly taxed.
>
> "Judgment affirmed."

Judge Jones holds in the case at bar that the golf fees are dues because the yearly obligation "recurred so long as the member chose to enjoy [the privilege]".

The *Foran* case held that golf fees were dues only because they constituted a "liability to pay monthly green fees, regardless of their [the members'] desire to continue to use the greens."

It will be seen that the reasoning and theory of this case and the definition of dues or membership fees which it lays down so distinctly, are in direct conflict with both the majority opinions in the case at bar. If, by reason of the fact that the judgment was in favor of the Government, the decision of the instant case is not in conflict with that of the case at bar, under the first sentence of Rule 35, 4, b, we asked that it be considered under Point 3 of this brief as a strong reason why this question of Federal law should be settled by this Court.

There are two cases in the Fourth Circuit from which the Government did not appeal.

Baltimore Country Club v. *United States*, 7 F. Supp. 607 (D. C., D. of Md., 1934). In this case the Government argued that the members who paid a semi-annual golf fee constituted "a particular class of membership" under the *Weld* definition. The court held (p. 608) that the golf fees were not dues or membership fees "because they are not based upon membership. They are not assessed upon any group or class of members because of membership. They are not required of any member unless he desires to play golf."

Williamson v. *United States*, 12 F. Supp. 26 (D. C., W. D. of N. C., 1934) is to the same effect.

3. This is an Important Question of Federal Law Which Should be Settled by This Court.

The Government in its petition for a certiorari in the *Winchester* case referred to the difficulty of administering this revenue measure in view of this diversity both of result and theory. From the taxpayer's standpoint the need for an authoritative definition of dues or membership fees is still more evident.

There are 621 members of the Merion Cricket Club whose claims are involved in the case at bar, to which should be added those who have started playing golf since 1935. It is likely that the great majority of clubs having golf links charge for their use by means of an optional golf fee terminable at the end of the period. Some of them doubtless have brought actions and the trials have been continued pending an authoritative decision. In other cases, the difficulties and expense involved have led to postponement of action.

So far as our knowledge goes the golf fees are the only periodical fees upon which the government has demanded the tax. As examples of such fees we refer to those of the Merion Cricket Club (45a). There are doubtless numerous other similar fees charged by other clubs. In the 1st, 4th

and 9th Circuits none of these fees are taxable. In the 3rd Circuit, on account of the entirely different approach of the two majority opinions, no one could guess which are taxable and which not.

A reasonable taxpayer (if there is one) should not object to a luxury tax such as this. But the golfing fraternity is widespread and an authoritative decision as to the meaning of this Statute by this Court, however the two cases are decided, would go far to silence the numerous criticisms we hear as to the general administration of this tax law.

We respectfully submit that the certiorari should be granted.

JOHN LEWIS EVANS,
Attorney for Petitioner.

May 10, 1941.

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